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YII CHEE MING v. YU CHEE HOE & ORS

HIGH COURT SABAH & SARAWAK, KUCHING

CELESTINA STUEL GALID JC

[ORIGINATING SUMMONS NO: KCH-24-86-12-2016]

27 JUNE 2017

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CIVIL PROCEDURE: *Striking out – Application for – Action by shareholder against directors – Allegation that shareholder’s rights and interest affected by directors’ failure/refusal to comply with statutory obligations – Application by directors to strike out shareholder’s originating summons – Whether shareholder had necessary locus standi – Whether shareholder aggrieved person – Whether originating summons ought to be converted to writ action to ensure that all disputed facts and issues were properly and judiciously tried and adjudicated – Whether it was plain and obvious that originating summons were unsustainable – Whether shareholder had reasonable cause of action – Whether originating summons frivolous, vexatious or abuse of court’s process – Whether originating summons ought to be struck out – Rules of Court 2012, O. 18 r. 19(1)(a), (b) & (d)*

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The plaintiff, the shareholder of Hock Seng Lee Berhad (‘the fifth defendant’) alleged that the first to fourth defendants, the directors of the fifth defendant, had affected his rights and interest as they (i) failed/refused to comply with their statutory obligations under s. 99B of the Securities Industry Act 1983 (‘the SIA’), s. 317 of the Capital Markets and Services Act 2007 (‘the CMSA’) and/or s. 135 of the Companies Act 1965 (‘the CA’); and/or (ii) breached their duties to make full and prompt disclosure of their acquisition and disposal of shares in the fifth defendant and/or its holding company, Hock Seng Lee Enterprise Sdn Bhd (‘HSLESB’). By an originating summons (‘the OS’), the plaintiff sought an order that the first to fourth defendants comply with the said statutory provisions. The first to fifth defendants (‘the defendants’) applied to strike out the OS, pursuant to O. 18 r. 19(1)(a), (b) and (d) of the Rules of Court 2012 (‘the ROC’) (‘the defendants’ application’), on the grounds that (i) the proceedings were an abuse of court process and not maintainable as the plaintiff had no *locus standi* and was not an aggrieved person; (ii) none of the said statutory provisions relied upon by the plaintiff vested a right to commence proceedings in the plaintiff as the statutory provisions concerned matters falling within the public sphere and were of regulatory nature; these matters were within the exclusive domain of regulatory authorities; (iii) there was a danger of multiplicity as the present court might arrive at findings on the said issues that were inconsistent with a consolidated trial which was pending before another High Court; and (v) the OS ought to be converted to a writ action to ensure that all disputed facts and issues were properly and judiciously tried and adjudicated. The defendants further prayed for the OS to be consolidated with the consolidated trial.

Held (dismissing defendants' application with costs):

- (1) The plaintiff asserted that he was a shareholder of the fifth defendant. This was supported by the fifth defendant's directors report and shareholding analysis ('exh. P6') which recorded the plaintiff as having 8,662,370 shares in the fifth defendant. Apart from merely stating that the plaintiff did not have *locus standi*, there was no actual denial in the defendants' affidavits of the plaintiff's assertion. The defendants did not expressly address or rebut the express averments by the plaintiff that he was a shareholder of the fifth defendant. Exhibit P6 and the failure of the defendants to either deny and/or rebut the plaintiff's shareholding clearly showed that this was not a plain and obvious case to be struck out. The issue of whether the plaintiff was a shareholder of the fifth defendant or otherwise would require further ventilation by the parties at the hearing of the OS. (paras 17, 18, 24 & 26)
- (2) There is nothing in s. 360 of the CMSA which limits its application to the test that entails the aggrieved person showing that there had been a breach or non-compliance of a requirement expressly stated in the Act. The words 'relevant requirement' in s. 360 of the CMSA must be given their ordinary meaning which is, a requirement which is imposed by or under the Act. In the present case, the requirement under s. 317 of the CMSA is for a director of a public-listed company to notify the company itself in writing of any event where the director becomes or ceases to become interested in the securities of the company or its associate corporation. There were no decided case dealing with the expression 'any person aggrieved by the alleged contravention' under s. 100(1)(c) of the CIA and s. 360(1)(d) of the CMSA. Therefore, such novel point called for careful and mature argument. (paras 49 & 50)
- (3) The argument that the OS amounted to an abuse of court process as the complaint in the OS was alleged to be a subject matter in the consolidated trial which was pending before another High Court was a non-starter. None of the pleadings in the consolidated trial was exhibited in this application. The defendants also did not set out any comparison between the question for determination and the reliefs sought in the OS with the issues for trial and the relief sought in each of the cases to support their allegation that there was a danger of multiplicity. There was no material before the court for it to properly exercise its discretion and to come to a conclusion that there was an abuse of process on the part of the plaintiff. (paras 51 & 52)
- (4) For the OS to be converted into a writ action, the defendants must be able to show that there was a substantial dispute of fact. This was not a fit and proper case for the OS to be converted into a writ action as (i) the contention that there was a substantial dispute of fact would run contrary to the defendants' earlier stand that it was plain and obvious

- A that the OS was unsustainable. The defendants could not be blowing hot and cold; and (ii) the reliefs sought for by the plaintiff in the OS were fairly straightforward. For reasons best known to them, the defendants appeared to skirt around those issues by not addressing or adducing any evidence to rebut the plaintiff's complaints in the OS. (paras 54 & 55)
- B (5) Even though the court had the discretion to order consolidation of two or more pending causes or matters under O. 4 r. 1 of the ROC, the court must first be satisfied that there were some common questions of law or fact arising in both or all of them and that the rights to relief claimed were in respect of or arose out of the same transactions. In order for the
- C court to arrive at such decision, there must be materials before it to consider. In this case, the fundamental materials were the pleadings filed in the cases. However, the defendants did not exhibit any of the said pleadings. (para 57)
- D (6) It was not plain and obvious that the OS was unsustainable. The defendants failed to establish that the plaintiff had no reasonable cause of action and/or that the OS was frivolous, vexatious or an abuse of the court's process. (para 58)

Case(s) referred to:

- E *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 SC (*refd*)
Government Of Malaysia v. Lim Kit Siang & Another Case [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC (*refd*)
Karpal Singh v. Sultan of Selangor [1987] 2 CLJ 342; [1987] CLJ (Rep) 686 HC (*refd*)
Lai Soon Onn v. Tan Tian Sin & Ors [2017] 7 CLJ 733 HC (*refd*)
- F *Lionel Lau Siang Kok v. Datuk Seri Panglima Lau Chon Kun* [2013] 1 CLJ 619 CA (*refd*)
Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor [1984] 1 LNS 178 FC (*refd*)
Mak Siew Wei v. Dato' Dr Norbik Bashah Idris & Ors [2016] 6 CLJ 64 HC (*refd*)
Shahidan Shafie v. Atlan Holdings Sdn Bhd & Anor [2017] 4 CLJ 587 CA (*refd*)
Yung Ing Ing v. Hunfara Construction Sdn Bhd [2015] 8 CLJ 1019 CA (*refd*)

G Legislation referred to:

- Capital Markets and Services Act 2007, ss. 58, 59, 67, 100(1)(c), 139B, 212, 217(3), 218(2), 219, 220, 234, 258, 288, 317(3), 357, 360(1)(a)(i), (ii), (iii), (d), (13)(c)
 Companies Act 1965, ss. 135, 362(2)
 Rules of Court 2012, O. 4 r. 1, O. 5 r. 4, O. 18 r. 19(1)(a), (b), (d)
- H Securities Industry Act 1983, ss. 99B, 100(1)(c)
- For the plaintiff - Andy Tan & Albert Tang; M/s Andy Tan & Assocs*
For the 1st, 2nd & 5th defendants - Alvin Chong, Victor Ng & Ratanah Devi; M/s Idris & Co Advocs

- I *Reported by Najib Tamby*

JUDGMENT

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Celestina Stuel Galid JC:**Background**

[1] By an originating summons dated 13 December 2016 (encl. 1) (“the OS”), the plaintiff, *inter alia*, applied for an order that the first, second, third and fourth defendants comply with the relevant statutory provisions under the Companies Act 1965 (“CA”), Securities Industry Act (“SIA”) and Capital Markets and Services Act 2007 (“CMSA”).

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[2] By a notice of application dated 16 January 2017 (encl. 4) (“the application”) the first, second, third, fourth and fifth defendants (hereinafter referred to as “the defendants” unless specifically stated otherwise) applied to strike out the OS. The application was made pursuant to O. 18 r. 19(1)(a), (b) and (d) of the Rules of Court 2012.

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[3] The grounds relied on by the defendants as summarised in the application are as follows:

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(a) that the proceedings herein are not maintainable as the Plaintiff does not have any basis in law to seek the remedies prayed for in the OS;

(b) that the proceedings herein are not maintainable as the Plaintiff does not have the necessary *locus standi*;

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(c) that the proceedings herein are in any event an abuse of process;

(d) none of the said statutory provisions relied upon by the Plaintiff vest a right to commence proceedings of the nature herein, or otherwise, in the Plaintiff. The said statutory provisions concern matters falling within the public sphere and are of a regulatory nature. These matters are within the exclusive domain of the regulatory authorities, if at all;

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(e) that the Plaintiff has not in way suffered an injury personal and specific to the Plaintiff. The Plaintiff is not aggrieved;

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(f) there is a danger of multiplicity in that the Honourable Court might arrive at findings on the said issues that are inconsistent with those of the court in the Consolidated Suits;

(g) the Plaintiff is looking to engage on a new front through the proceedings herein and the OS is therefore a tactical manoeuvre to pressure the Defendants; and

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(h) The OS ought to be converted into a Writ action to ensure that all disputed facts and issues are properly and judiciously tried and adjudicated upon.

[4] The plaintiff opposed the application.

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A The Plaintiff's Claim In The OS

[5] It is pertinent to first set out the nature of the plaintiff's claim in the OS.

B **[6]** The plaintiff claimed that as a registered shareholder of the fifth defendant, he has the common law and statutory right to expect and to ensure that the first, second, third and fourth defendants to comply with their statutory obligations in the management and affairs of the fifth defendant.

C **[7]** The plaintiff further claimed that the first, second, third and fourth defendants as directors of the fifth defendant had failed or refused to comply with their statutory obligations as provided in s. 99B of the SIA and/ or s. 317 of the CMSA and/or s. 135 of the CA and/or had breached their duties to make full and prompt disclosure of their acquisition and disposal of shares in the fifth defendant and/or its holding company, Hock Seng Lee Enterprise Sdn Bhd ("HSLESB") thereby affecting his rights and interest.

D **[8]** The plaintiff is seeking for the following orders in the OS:

E (a) that the first defendant comply with s. 317 of the CMSA and s. 135 the of CA and disclose in writing to the fifth defendant of his acquisition and subsequent disposal of 8,576,800 shares in the fifth defendant on or around 2 September 2013;

(b) that the second defendant comply with s. 317 of the CMSA and disclose to the fifth defendant of the acquisition by Yu Chee Lieng & Sons Sdn Bhd of 1,387,059 shares in Hock Seng Lee Enterprise Sdn Bhd ("HSLESB") on or around 14 February 2014;

F (c) that the third defendant:

(i) comply with s. 99B of the SIA and disclose in writing to the Securities Commission of the acquisition by his spouse of 693,529 total shares in HSLESB on or around 9 November 1998, 20 December 1999, 5 July 2000 and 5 June 2002;

G (ii) comply with s. 317 of the CMSA and disclose in writing to the fifth defendant of the disposal by his spouse of 693,529 shares in HSLESB on or around 14 February 2014;

(d) that the fourth defendant:

H (i) comply with s. 99B of the SIA and disclose in writing to the Securities Commission of the acquisition by his spouse of 693,530 total shares in HSLESB on or around 9 November 1998, 20 December 1999, 5 July 2000 and 5 June 2002;

I (ii) comply with s. 317 of the CMSA and disclose in writing to the fifth defendant of the disposal by his spouse of 693,530 shares in HSLESB on or around 14 February 2014;

(e) that the first, second, third and fourth defendants comply with the aforesaid orders within seven days from the date of the order;

(f) a consequential order that:

- (i) the first, second, third and fourth defendants be removed from their office as directors of the fifth defendant;
- (ii) the first, second, third and fourth defendants be barred from becoming a director and being involved in the management directly or indirectly of the fifth defendant or any other public company for a period of five years or alternatively for such other period of time as this court deems fit.

The Defendants' Contentions

The "locus standi" Point

[9] The defendants' main ground in this application was that the plaintiff has no *locus standi* to seek the reliefs in the OS.

[10] On this issue, it is of assistance to refer to the explanation by Abdul Hamid CJ (Malaya) (as he then was) (delivering the majority judgment) in the Supreme Court case of *Government Of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63; [1988] 2 MLJ 12, as to what the term "*locus standi*" meant as follows:

'*Locus standi*' is generally understood to mean the right of a party to appear and be heard by a tribunal. A litigant is said to have *locus standi*, in effect standing to sue in a court of law, if that court recognises his or her ability to institute and maintain proceedings before it. The question of standing is thus separate and distinct from questions of the substantive merits and the legal capacity of the plaintiff. It follows, therefore, that a litigant may lack standing to bring a case which would succeed if brought by the right litigant.

[11] His Lordship further elucidated the term in the case of *Karpal Singh v. Sultan of Selangor* [1987] 2 CLJ 342; [1987] CLJ (Rep) 686; [1988] 1 MLJ 64 as follows:

There are various approaches which a court may adopt in deciding the question of *locus standi*. One approach is to ask whether the plaintiff has "a cause of action". Another approach is to determine whether the plaintiff can establish a "right" which the court may declare. Yet another approach is to require the plaintiff to demonstrate "a special injury" resulting from the subject matter of the declaration. A fourth approach requires the plaintiff to have an "interest" in the subject matter of the declaration to be litigated. A final approach leaves the question of standing to be determined by the court in the exercise of its discretion.

[12] In the present case, the defendants had mounted their challenge on the plaintiff's (lack of) *locus standi* on the ground that the plaintiff was not an "aggrieved person" as provided under the various statutory provisions in the SIA, CMSA and CA relied on by the plaintiff in the OS namely s. 100 of the SIA, s. 360 of the CMSA and s. 362 of the CA.

A [13] The relevant parts of these provisions are reproduced below:

Section 100 of the SIA

(1) Where:

...

B (c) on an application by **any person aggrieved** by an alleged contravention by another person of a relevant requirement, it appears to the High Court that:

(i) **the other person has contravened the relevant requirement;**
and

C (ii) **the applicant is aggrieved** by the contravention,
the High Court may, without prejudice to any order it would be entitled to make otherwise than pursuant to this section, make one or more of the following orders ...

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(8) For the purposes of this section, “**relevant requirement**”:

(c) in relation to **an application by the aggrieved person, means a requirement:**

E (i) **which is imposed by or under this Act; ...**

Section 360 of the CMSA

(1) Where:

...

F (d) on an application by **any person aggrieved** by an alleged contravention by another person of a relevant requirement, it appears to the court that:

(i) **the other person has contravened the relevant requirement;**
and

G (ii) **the applicant is aggrieved** by the contravention,
the court may, without prejudice to any order it would be entitled to make otherwise than pursuant to this section, make one or more of the following orders ...

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(13) For the purposes of this section, “**relevant requirement**”:

(c) in relation to **an application by the aggrieved person, means a requirement:**

I (i) **which is imposed by or under this Act; ...**

Section 362 of the CA

(2) If any officer or former officer of a company has failed or omitted to do any act, matter or thing which by or under this Act he is or was required or directed to do, **the Court on the application of the**

Registrar or **any member of the company** or the Official Receiver or liquidator may by order require that officer or former officer to do the act, matter or thing forthwith or within such time as is allowed by the order, and for the purpose of complying with any such order a former officer shall be deemed to have the same status, powers and duties as he had at the time the act, matter or thing should have been done. (emphasis added.)

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[14] Relying on the case of *Government of Malaysia v. Lim Kit Siang*, *supra*, the defendants contended that the plaintiff was not an “aggrieved person” in that:

- (a) the plaintiff was not a director or shareholder of the fifth defendant;
- (b) the plaintiff was not even a director or shareholder in HSLESB, the majority shareholder of the fifth defendant;
- (c) there was no injury or harm caused to the plaintiff by the alleged statutory breached complained of; and
- (d) that if at all, it is the fifth defendant that was injured (which was denied) and that the plaintiff did not commence the OS as a derivative action for the fifth defendant.

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[15] I will first deal with the issue of the plaintiff’s shareholding in the fifth defendant.

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[16] In para. 1 of his affidavit in support of the OS (encl. 2), the plaintiff expressly averred that he was the registered shareholder of more than eight million shares in the fifth defendant. The plaintiff’s averment ie, that he was a shareholder of the fifth defendant was further repeated in para. 4 of the plaintiff’s affidavit in reply (encl. 6), para. 4 of the plaintiff’s affidavit in opposition to the application (encl. 7) and para. 6 of the plaintiff’s affidavit in reply (2) (encl. 17).

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[17] Curiously, and notwithstanding this being a central issue raised by the defendants themselves in this application, the defendants did not expressly address or rebut the express averments by the plaintiff that he was a shareholder of the fifth defendant company in any of their affidavits. Apart from merely stating that the plaintiff did not have *locus standi*, there was no actual denial in the defendants’ affidavits of the plaintiff’s assertion.

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[18] In addition, the plaintiff drew this court’s attention to the fifth defendant’s directors’ report and shareholding analysis for years 2013 and 2014 exhibited as “P6” in his affidavit in support to the OS (encl. 2). In this report, the plaintiff was recorded as having 8,662,370 shares in the fifth defendant. Again, there was no express rebuttal or explanation by the defendants on this issue or exh. “P6”.

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A [19] In their written submission, learned counsel for the defendants did allude to the plaintiff's shareholding in HSLESB as follows:

- B 6. The Plaintiff was a shareholder (16.67%) of HSLESB from 1995 until 1998. However, from 1998 to 2002, the Plaintiff transferred all his shares in HSLESB to his four sisters for valuable consideration. The Form 32A Share Transfer forms were executed to give effect to all the transfers. The said forms show that the shares were transferred for consideration.
- C 7. When the Plaintiff transferred his shares in HSLESB, he executed a Proforma Form under section 99B, SIA and lodged the forms with Bursa Malaysia. The Plaintiff had also issued a similar notice to the 5th Defendant entitled "Notice of Person Ceasing to be a Substantial Shareholder" under Form 29C, CA.

D [20] However, these amounted to submissions from the Bar as the defendants' affidavits were silent on this. The documents referred to ie, Form 32A share transfer forms, proforma form under s. 99B of the SIA, and the "notice of person ceasing to be a substantial shareholder" under Form 29C of the CA were also not exhibited in any of the defendants' affidavits. In addition, the one-liner submission by learned counsel for the defendants that the plaintiff was not a registered shareholder of the fifth defendant was also unsupported by the defendants' affidavits. As mentioned earlier, the

E defendants did not deny nor rebut the plaintiff's assertion on this issue save for to say that he did not have *locus standi* which is not the same as to say that he was not a shareholder of the fifth defendant.

F [21] Next, it was submitted for the defendants that the plaintiff was not an "aggrieved person" within the meaning of the provisions alluded to earlier. The term "aggrieved person" is not defined under the SIA, CMSA and/or the CA. Reliance was made by the defendants on the case of *Government of Malaysia v. Lim Kit Siang, supra*, to contend that a person "aggrieved" was not merely one who was dissatisfied with some act or decision but one who

G has been wrongly deprived of or has been refused something to which he was legally entitled. The defendants further contended that the plaintiff had not suffered such injury or harm by the alleged statutory breach complained of.

H [22] To give it context, the facts of the case of *Government of Malaysia v. Lim Kit Siang, supra*, are as follows. The Ministry of Works issued a letter of intent to United Engineers (M) Berhad ("UEM") indicating that the Government of Malaysia was prepared to enter into a contract with UEM in respect of the construction and maintenance of certain roads. The respondent, who was the leader of the opposition in the Dewan Rakyat at that time, claimed that UEM was ultimately owned and controlled by UMNO and that its leaders had taken part in Cabinet deliberations relating to the

I same project and that therefore, the award to UEM was improper, unfair and tainted with bias. One of the issues raised was whether the respondent had *locus standi* to commence the action in the High Court.

[23] Salleh Abas LP (as he then was) held that the respondent had no legal relationship with UEM, that he was not a shareholder and therefore a complete stranger to the said company. It was, *inter alia*, on this ground that the court held that the respondent's statement of claim did not disclose any cause of action to enable him to maintain the suit against UEM.

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[24] In contrast, the plaintiff in the present case had asserted that he was a shareholder of the fifth defendant company. The fifth defendant's directors report and shareholding analysis for years 2013 and 2014 (exh. "P6") coupled with the failure of the defendants to either deny and/or rebut this assertion clearly shows that this is not a plain and obvious case to be struck out - see *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36 and *Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor* [1984] 1 LNS 178; [1984] 2 MLJ 105.

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[25] In coming to such conclusion, I am mindful of the fact that apart from s. 99B of the SIA and s. 360 of the CMSA, the plaintiff's action was also premised on s. 362(2) of the CA which provides that "any member of the company" may make an application to court to compel any officer of a company to comply with to do the act, matter or thing which by or under the Act he is or was required to do. I also note that while learned counsel for the defendants has extensively dealt with the provisions under the SIA and CMSA, they did not deal with the plaintiff's *locus standi* in relation to the CA.

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[26] Taking all of the above in totality, I am therefore of the view that at the very least, the issue of whether the plaintiff was indeed a shareholder in the fifth defendant company or otherwise, being a central or fundamental to the application (and ultimately, the OS) will require further ventilation by the parties at the hearing of the OS. This, to me, is sufficient for this court to dismiss the application on this ground alone. However, for the sake of completeness, the court will consider the rest of the contentions raised by the defendants below.

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The "Exclusive Domain" Point

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[27] Related to the issue of whether the plaintiff was an "aggrieved person" within the meaning of the statutory provisions relied on by the plaintiff in the SIA, CMSA and CA, it was the defendants' contention that the matters complained of in the OS fall within the regulatory framework of the Securities Commission ("SC"). It was further submitted that it was the SC to take action pertaining to a complaint of a breach of a statutory provision and that therefore the plaintiff was not entitled to the reliefs prayed for in the OS.

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[28] In support of this contention, the defendants referred to and relied on the recent Court of Appeal decision of *Shahidan Shafie v. Atlan Holdings Sdn Bhd & Anor* [2017] 4 CLJ 587 which concerned an application by a party

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A under s. 153 of the Securities Commission Act 1983 (“SCA”) for an order that the respondent makes a mandatory take-over offer to all shareholders of a certain company.

[29] Section 153 of the SCA (which is now repealed and replaced with s. 357 of the CMSA) is reproduced below:

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(1) A person who suffers loss and damage by reason of, or by relying on, the conduct of another person who has contravened any provision of Part IV or any regulations made under this Act may recover the amount of the loss or damage by instituting civil proceedings against the other person whether or not that other person has been charged with an offence in respect of the contravention or whether or not a contravention has been proved in a prosecution.

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(2) Notwithstanding the provisions of any written law relating to limitation of time, an action under subsection (1) may be begun at any time within six years from the date on which the person referred to in subsection (1) became aware of the contravention, whichever is the later.

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[30] One of the issues for the Court of Appeal’s determination was, whether the plaintiff had *locus standi* to launch the suit against the respondents in the context of the SCA. That required the Court of Appeal to consider whether s. 153 of the SCA evoked an intention of the Parliament to give a private cause of action for breach of a statutory duty ie, in that case, the mandatory take-over offer to purchase the company shares.

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[31] The Court of Appeal decided the said issues in the negative, *inter alia*, holding as follows:

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[26] It is our view that premised on the aforesaid provisions, it can be said that it is the intention of Parliament for the Securities Commission to be tasked to supervise, regulate, issue rulings from time to time and enforce the practices of companies bound by the SC Act 1993 and the Take-Over Code. The learned judge in the High Court in fact found that the only remedy available to the plaintiff was to complain to the Securities Commission about the conduct of the defendants and if the Securities Commission failed to act or makes a ruling unfavourable to the plaintiff, his only option was to apply to the court for judicial review of the decision of the Securities Commission. In short, the plaintiff’s remedy was one of public law.

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[27] To revert back and recapitulate s. 153, it states that:

A person who suffers loss and damage by reason of, or relying on, the conduct of another person who has contravened any provision of Part IV or any regulations made under this Act may recover the amount of the loss or damage by instituting civil proceedings against the other person whether or not that other person has been charged with an offence in respect of the contravention or whether or not a contravention has been proved in a prosecution.

It is a cardinal rule of construction of statute that courts must give the words used their natural meanings and applying the same, we cannot get away from the fact that the words used are also quite explicit in giving a person who had suffered damage a private cause of action to recover the same from anyone who had failed to comply any provision of the law.

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[28] As we have intimated earlier, in construing s. 153 we must take into consideration of other provisions in the SC Act to discern the context. Hence in doing so, we agree with learned counsel for the defendants that the plaintiff's right to sue can only exist when the Securities Commission had made a ruling. In the case before us, the Securities Commission must first make a ruling that the defendants had acquired control of Naluri in the context of the relevant law and was required to make the mandatory take-over offer to the shareholders of the Naluri. From the record of Appeal, it is undisputed that the Securities Commission was aware of the allegation of the defendants having "acquired control" of Naluri and had sought clarification from the Board of Directors of Naluri. The Securities Commission after considering Naluri's clarification took no further action. As intimated above, the plaintiff should have sought a review of the Securities Commission decision in court. This he did not do.

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[29] If we were to adopt the interpretation of s. 153 of the SC Act of the plaintiff, it would amount to the court stepping into the shoes of the Securities Commission which is tasked to supervise and regulate the conduct of companies. As we have said earlier, that is not and cannot be the intention of Parliament. Our interpretation reconciles s. 153 with the other provisions in the SC Act and that is the private cause of action for breach of statutory duty is preserved to the extent only after the Securities Commission has made a specific ruling. This would avoid a situation where there would be two decisions, one of the court and the other the Securities Commission. This scenario would bring uncertainty to the business world which must be avoided. Our interpretation allows only one decision at one time and that is the decision of the Securities Commission until the same is either set aside or substituted by the courts.

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[32] In addition, learned counsel for the defendants also referred to the High Court case of *Lai Soon Onn v. Tan Tian Sin & Ors* [2017] 7 CLJ 733; [2017] MLJU 46 which applied the decision in *Shahidan*. That case involved an application to strike out the plaintiff's claim for declaratory orders under s. 357 and s. 360 of the CMSA that the defendants had contravened the CMSA in failing to undertake a mandatory offer of shares in an acquisition exercise.

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[33] In discussing s. 360 of the CMSA, the learned Judicial Commissioner Noorin Badaruddin, *inter alia*, made the following observations:

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[83] The Plaintiff in his submission seeks to use the general provision in s. 360 of the CMSA to override the specific provisions contained in ss. 217 and 218. Section 220 of the CMSA clearly provides for

A recourse to the SC to take action in cases of non-compliance with the Code. This court is of the considered view that the only harmonious interpretation is that s. 360 of the CMSA does not apply to Division 2 of Part VI of the CMSA. If it does, then there will be an overlap between s. 220 with s. 360 (1)(a) of the CMSA. It cannot be so. Then, the irresistible conclusion would be that Parliament has legislated in vain. Sections 220 and 360 of the CMSA cannot be the same because of they are, either one will be superfluous. Every provision in any statutes is there for a specific purpose. The word 'requirement' is not in Part VI because Parliament does not envision a third party to enforce the Code. Parliament envisioned the SC to enforce the Code.

C [84] This court further agrees that an interpretation which affords the SC the right of recourse against non-compliance with the Code pursuant to s. 220 and s. 360 of the CMSA is not harmonious. Therefore, it is safe for this court to conclude that Parliament did not intend to confer a private right to compel the Defendants to undertake the MGO under s. 360 of the CMSA.

[34] Learned counsel for the plaintiff sought to distinguish *Shahidan* and *Lai Soon Onn* on several grounds.

E [35] Firstly, that *Shahidan* and *Lai Soon Onn* concerned claims for reliefs including for declaratory orders and damages under s. 357 of the CMSA which was not the same as the plaintiff's action in the OS which was, *inter alia*, made pursuant to s. 360 of the CMSA.

F [36] Secondly, that the decision by the Court of Appeal in *Shahidan* was understandable given that the appellant's action therein was premised on the facts that the respondents having control of the company were required by law to make a mandatory takeover offer to the shareholders and that was the basis for the Court of Appeal's decision that the SC must first make such ruling before the appellant may sue premised on that fact. This, it was further submitted, was in view of the wordings in s. 153 of the SCA which uses the phrase "another person who has contravened any provision" which necessarily implies that the SC must first determine that there was such contravention in the first place. Learned counsel for the plaintiff went on further to draw the distinction in s. 357 of the CMSA which uses the phrase "it appears to the High Court" submitting that it indicated that the contravention remained an allegation and for it to be determined by the High Court as opposed to the SC.

I [37] Thirdly, it was submitted for the plaintiff that to require the SC to make a prior ruling on the matters complained of under s. 99B of the SIA and s. 317 of the CMSA is illogical as it would amount to the SC usurping the function of the High Court in determining whether there has been a non-compliance under s. 360 of the CMSA and that there would be no question of fact left for the High Court to determine.

[38] It was further urged upon this court that the decision in the case of *Mak Siew Wei v. Dato' Dr Norbik Bashah Idris & Ors* [2016] 6 CLJ 64, where the learned Judicial Commissioner Mohd Nazlan Ghazali in dealing with s. 360 of the CMSA, considered and distinguished the case of *Shahidan* was to be preferred.

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[39] In *Mak Siew Wei*, there was also a challenge as to the plaintiff's *locus standi* to make the claim under s. 357 of the CMSA for a declaration that the defendants had breached, *inter alia*, s. 218(2) of the CMSA and for damages arising thereof.

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[40] In dismissing the defendants' striking out application, the learned Judicial Commissioner, *inter alia*, held that the enforcement mechanisms can be initiated and pursued by either the SC or the persons aggrieved by the breach (ss. 357 and 360). The learned Judicial Commissioner distinguished the case of *Shahidan* on the ground that the Court of Appeal was not required or invited to consider the other provisions in the SCA other than s. 153, stating as follows:

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Whilst it is not doubted that s. 357 of the CMSA is in *pari materia* with s. 153 of the SCA, *Shahidan Shafie* concerned the application of the relevant take over provisions in the SCA which were in force then. The Court of Appeal was not presented with the opportunity to consider the context of the relevant provisions of the CMSA which had not yet been introduced to apply to the facts at the relevant time, and which Act has since consolidated the principal legislative provisions governing issue of securities and take overs previously found in the SCA, as well as the entirety of the Securities Industry Act 1983 and the Futures Industry Act 1993, both of which have thus been repealed. Furthermore, and in any event, *Shahidan Shafie* did not have to examine the scope of the s. 360 of the CMSA which however is relied on by the plaintiff in the instant suit, in addition to s. 357 of the same Act.

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Fifthly, both the SC and any person aggrieved by the relevant transgression (as well as the exchange holding company or the stock exchange), may also, separately, seek the assistance of the court, under s. 360(1)(a) and (d) respectively, since a contravention of the requirement to undertake a mandatory general offer permits the court to make various orders stated in paras. (A) to (O) of s. 360(1) ... And crucially for present purposes, this can be done without the involvement of the SC because first, it is not mentioned in these sections or any other parts of the CMSA that any form of determination by the SC such as in the nature of a ruling is a pre-requisite and secondly, ss. 358 and 360(1)(a) and (b) separately confer on the SC precisely substantially the same statutory right to pursue civil proceedings against the person in default, as those embodied in ss. 357 and 360(1)(d) *vis-à-vis* any person aggrieved by the breach ... A contrary construction on the private statutory right of the persons who suffer losses to sue the defaulter would otherwise invite a certain degree of incoherence, both conceptually, as well as in practical terms ...

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- A [41] Having considered the three cases referred to above, I tend to agree with learned counsel for the plaintiff that both the case of *Shahidan* and *Lai Soon Onn* are distinguishable in that they were dealing with s. 357 of the CMSA and for claims involving declaratory orders and damages as reliefs. In contrast, the plaintiff herein was not claiming for loss or damages but an order to compel the first, second, third and fourth defendants to comply with the statutory provisions. The plaintiff was also not seeking for declaratory orders.
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[42] The learned Judicial Commissioner in *Lai Soon Onn* in fact confined the decision in *Shahidan* to s. 153 of the SCA (now s. 357 of the CMSA) only.

- C This is what Her Ladyship had said:

[49] What is the actual implication of the Court of Appeal's decision in *Shahidan bin Shafie*? Does that mean that a ruling of the SC must first be obtained every time when one wants to take actions under the CMSA? *This court is of the considered view that Shahidan bin Shafie's case must be confined to s. 153 of the SCA which is now s.357 of the CMSA. To extend it further would do injustice. So whether s. 360 was in the SCA before would not make any difference to the Court of Appeal's decision because section 357 and section 360 cater to totally different reliefs.*

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..

- E [103] Secondly, the natural outcome of the decision in *Shahidan bin Shafie* is that the plaintiff needs a prior SC's ruling **before claiming for pecuniary loss**" (emphasis added.)

[43] The observation by the learned Judicial Commissioner in *Lai Soon Onn* above appears to be consistent with the argument put forth by learned counsel for the plaintiff that there was no requirement for a ruling by the SC for an action pursuant to s. 360 of the CMSA (see [36] and [37] above).

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[44] Next, I have taken note of the interpretation by the High Court in *Lai Soon Onn* of the phrase 'relevant requirement' in s. 360 of the CMSA to mean the "requirement" as expressly provided for in the Act. The court therein came to such conclusion after having considered the examples referred to it such as the requirement for capital markets services licence (s. 58), requirement for capital markets services representative's licence (s. 59), minimum financial requirements for holder of a capital markets services licence (s. 67), requirement for approval to establish or operate a private retirement scheme administrator (s. 139B), requirement for approval, registration, authorisation or recognition (s. 212), requirement to register prospectus in relation to securities (s. 232), requirement to lodge prospectus with Registrar (s. 234), requirement for trust deed and trustee (s. 258) and requirement for trustee and deed (s. 288). As ss. 217(3) to 220 of the CMSA which were being considered did not contain the word 'requirement', the learned Judicial Commissioner was of the view that the plaintiff's reliance to s. 360 of the CMSA was misplaced. The court went on further to hold that "pursuant to s. 360 of the CMSA, one becomes an aggrieved person only when there is contravention of a 'relevant requirement'."

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[45] It would appear that the court in *Lai Soon Onn* had limited the applicability of s. 360(1)(d) read with s. 360(13)(c) of the CMSA to a breach or contravention of the provisions in the CMSA where the word 'requirement' appears.

[46] I have considered the examples of the provisions with the word 'requirement' referred to the court in *Lai Soon Onn* and I note that apart from ss. 67 and 234, the breach of any of the rest would constitute an offence attracting, *inter alia*, penal liability. For instance, s. 58 of the CMSA provides as follows:

Requirement for Capital Markets Services Licence

58. (1) No person shall whether as a principal or agent, carry on a business in any regulated activity or hold himself out as carrying on such business unless he is the holder of a Capital Markets Services Licence or is a registered person.

...

(4) Any person who contravenes subsection (1) commits an offence and shall, on conviction, be liable to a fine not exceeding ten million ringgit or to imprisonment for a term not exceeding ten years or to both.

[47] As rightly pointed out in *Lai Soon Onn*, it is the Attorney General as the Public Prosecutor who is vested with the power to prosecute criminal matters and that it was unacceptable that criminal law should be enforced by means of civil proceedings. This must necessarily include the enforcement of the provisions which contain a penal sanction such as s. 58 of the CMSA in the example above. That being the case, I am, with the greatest of respect, unable to reconcile with the interpretation by the court in *Lai Soon Onn* that an aggrieved person may go to the High Court to seek for reliefs for a breach or contravention of such provisions on the basis that the word 'requirement' appears therein.

[48] In addition, the court in *Lai Soon Onn* applying the *ratio decidendi* in the case of *Yung Ing Ing v. Hunfara Construction Sdn Bhd* [2015] 8 CLJ 1019; [2015] 5 MLJ 668, held that since the word 'requirement' was not found in ss. 217 to 220 of the CMSA, it must follow that s. 360 of the CMSA was not intended to confer on the plaintiff a right to apply to compel the defendants to undertake a mandatory take over. It will be noted that s. 360(1)(a)(i), (ii) and (iii) of the CMSA which relate to the right of the SC to make applications to the court also uses the words 'relevant requirement'. With the greatest of respect, if the interpretation in *Lai Soon Onn* is to be followed, even the SC would not be able to rely on s. 360(1) of the CMSA for reliefs pertaining to the contravention or breach of s. 317 of the CMSA as the word 'requirement' is absent in that provision.

[49] I would therefore respectfully depart from the view by the learned Judicial Commissioner in *Lai Soon Onn* that the test in s. 360 of the CMSA entails the aggrieved person showing that there had been a breach or

- A non-compliance of a ‘requirement’ expressly stated in the Act such as in the examples given. To my mind, there is nothing in s. 360 of the CMSA which limits its application as such. The words ‘relevant requirement’ in s. 360 of the CMSA must be given their ordinary meaning that is, a requirement which is imposed by or under the Act. In the present case, the requirement under
- B s. 317 of the CMSA is for a director of a public listed company to notify the company itself in writing of any event whereby the director becomes or ceases to become interested in the securities of the company or its associate corporation.

- [50] It is trite law that the court should only exercise its power to strike out only in exceptional circumstances. In the light of this court’s findings that the case of *Shahidan* and *Lai Soon Onn* are distinguishable on their facts from the present case, and there being no decided cases dealing with the expression “any person aggrieved by the alleged contravention” under s. 100(1)(c) of SIA and s. 360(1)(d) of the CMSA, I would agree with the submission by the
- D learned counsel for the plaintiff that such novel point calls for careful and mature argument and that therefore, it is not plain and obvious that the OS should be struck out - see *Lionel Lau Siang Kok v. Datuk Seri Panglima Lau Chon Kun* [2013] 1 CLJ 619; [2013] 2 MLJ 889 and *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd*, *supra*.

E *The Abuse Of Process Point*

- [51] The defendants, have also in this application, alleged that the OS amounted to an abuse of process as the complaint in the OS was alleged to be a subject-matter in the consolidated trial (consisting of nine cases) which is pending before another High Court in Kuching.

- F [52] With respect to learned counsel for the defendants, this is a non-starter as none of the pleadings in the consolidated trial have been exhibited in this application. The defendants have also not set out any comparison between the question for determination and the reliefs sought in the OS with the issues
- G for trial and the reliefs sought in each of the nine cases to support their allegation that there was a danger of multiplicity. In short, there was no material before this court for it to properly exercise its discretion and to come to a conclusion that there was an abuse of process on the part of the plaintiff.

H *The Defendants’ Other Applications*

- [53] Although this application was made specifically under O. 18 r. 19(1)(a), (b) and (d) of the Rules of Court 2012, the defendants have also prayed for the OS to be converted into a writ action and be consolidated with the nine cases, as an alternative.

- I [54] For the OS to be converted into a writ action, the defendants must be able to show that there was a substantial dispute of fact - see O. 5 r. 4 of the Rules of Court 2012. Firstly, it appears to me that such contention (that there

was a substantial dispute of fact) would run contrary to the defendants' earlier stand that it was plain and obvious that the OS was unsustainable. With respect, the defendants cannot be blowing hot and cold.

[55] Secondly, I find that the reliefs sought for by the plaintiff in the OS namely for the defendants to comply with the relevant statutory provisions were fairly straightforward in that they hinged on whether the plaintiff was entitled to make such application, whether the defendants have acquired and/or disposed of the shares in the respective companies as alleged by the plaintiff and if so, whether the defendants have complied with the relevant statutory provisions. However, for reasons best known to them, the defendants appear to skirt around those issues by not addressing or adducing any evidence to rebut the plaintiff's complaints in the OS. An example is the issue regarding the plaintiff's shareholding in the fifth defendant as alluded to earlier.

[56] I am therefore not persuaded that this is a fit and proper case for the OS to be converted into a writ action.

[57] Next, the defendants also prayed for the OS to be consolidated with the nine cases in the consolidated trial. While it is true that the court has discretion to order consolidation of two or more pending causes or matters under O. 4 r. 1 of the Rules of Court 2012, the court must first be satisfied that there are some common question of law or fact arising in both or all of them and that the rights to relief claimed therein are in respect of or arise out of the same transactions. It therefore goes without saying that in order for the court to come to such decision, there must be materials before it to consider. In this case, the fundamental materials are the pleadings filed in the nine cases. However, as earlier stated, the defendants have not exhibited any of the said pleadings. As it stands, there are no materials before this court to even consider the application to have the OS consolidated with the nine cases in the consolidated trial. Again, this to me is a non-starter.

Conclusion

[58] Having considered both parties' contentions on the issues raised in this application, I am of the view that it is not plain and obvious that the OS is unsustainable. The defendants have not established that the plaintiff has no reasonable cause of action and/or that the OS is frivolous, vexatious or an abuse of the court's process.

[59] I therefore dismiss the defendants' application under encl. 4 with costs of RM5,000 to the plaintiff and subject to payment of the allocatur fees.

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